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In the Supreme Court
of the United States

OCTOBER TERM, 1967

No. 1020

DWAIN LEE LITTLE, also known as Dwain Lee Hardin,

Petitioner,

v.

STATE OF OREGON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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v.

STATE OF OREGON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon made and entered in the above-entitled case on September 20, 1967.

CITATION TO OPINION BELOW

The Supreme Court of the State of Oregon filed an opinion, printed in Appendix B hereto, page 14 which is reported in 85 Or. Adv. Sh. 205, 431 P.2d 810 (1967).

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was entered on September 20, 1967. A timely petition for rehearing filed on October 10, 1967, was denied on October 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3) 1948.

QUESTIONS PRESENTED

1. Whether from the evidence the defendant could be found to have consented to the removal of hair from his head and pubic area and the taking of samples of his blood and saliva in order that the prohibition of the Fourth Amendment of the Constitution of the United States against unreasonable search and seizure was not violated.

2. Whether the subject of a criminal investigation must be warned of his right to refuse a warrantless search, his right to counsel, and his right to remain silent before he can be held to have knowingly and intelligently waived his right to refuse a search of his person when his waiver is required in order that the prohibition of the Fourth Amendment of the Constitution of the United States against unreasonable search and seizure is not violated.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fourth Amendment to the Constitution of the United States printed in Appendix A, infra 13.

STATEMENT OF THE CASE

On November 2, 1964, Orla Fay Fipps was killed. The investigating officers indicated their desire to perform certain tests upon the petitioner. On November 13 and November 14, 1964, samples of blood, pubic hair, head hair, and saliva were removed from the person of the petitioner without any verbal consent from the petitioner himself (Tr. on Motion to Suppress Hearing, pages 17, 18, 63, 100-102, 129). The petitioner was never shown to have been told of his right to refuse a warrantless search (Tr. of Hearing on Motion to Suppress, pages 2-31). The petitioner was thereafter charged with murder in the Juvenile Court for Lane County, Oregon, on November 19, 1964. Petitioner was held in custody until his sixteenth birthday and on December 20, 1964, was remanded to an adult court and indicted for First Degree Murder. Petitioner pleaded not guilty.

HOW FEDERAL QUESTION PRESENTED

The petitioner made a timely pretrial motion to suppress the evidence obtained (hair, blood, and saliva) as a result of the above search on the ground

that such evidence was unlawfully seized and taken from the petitioner by an officer of the Oregon State Police and that such evidence was unlawfully searched and seized as it was not made pursuant to any warrant, was not incident to lawful arrest, and was without invitation or permission on the part of petitioner and therefore violative of the Fourth Amendment of the Constitution of the United States of America (Motion to Suppress filed January 13, 1966). A hearing was held on such motion and evidence taken (Tr. of Hearing on Motion to Suppress). The motion to suppress was denied, the trial judge holding that the defendant consented and waived his right against search and seizure (Opinion, Findings of Fact and Conclusions of Law filed January 20, 1966). Petitioner objected formally to such Findings and Conclusions (Objection filed January 20, 1966).

TRIAL

The trial subsequently was held, the State offering evidence based substantially upon the various scientific tests made from the samples of blood, pubic hair, head hair, and saliva taken from petitioner. The jury returned a verdict of guilty of Murder in the First Degree, and petitioner was sentenced to life imprisonment in the Oregon State Penitentiary.

APPEAL

After conviction, petitioner appealed to the Supreme Court of the State of Oregon, raising as one

of several assignments of error that the trial court erred in denying petitioner's motion to suppress the evidence.

The Supreme Court of Oregon affirmed the conviction, holding that the petitioner had consented to the taking of the samples and that the prohibition of the Fourth Amendment had not been violated (Appendix A, page 13).

REASONS FOR GRANTING THE WRIT

I

This Court is extremely well aware of certain inalienable rights afforded every individual. One such right is the protection against unreasonable search and seizure as expounded in the Fourth Amendment to the United States Constitution, the basic purpose of this right being to safeguard privacy and security of individuals against the arbitrary invasions by government officials. This right cannot be forgiven in the name of law enforcement. *Berger* v. *New York*, 385 U.S. 967 (1967).

A lawful search and seizure presupposes a lawful and valid search warrant, a search incidental to a lawful arrest or the consent of the defendant. The evidence that this Court need be cognizant of is contained entirely within the transcript of the motion to suppress hearing. The petitioner was not under arrest at the time of the search and seizure (Tr. on Motion to Suppress Hearing, page 3). Petitioner was

arrested on November 18, 1964, some four to five days later than the search and seizure itself (Tr. on Motion to Suppress Hearing, pages 3 and 8). Therefore the search and seizure were not made incidental to the petitioner's arrest. See *Stoner* v. *California*, 376 U.S. 483 (1964), holding that an arrest two days after a search does not meet the standard of "incidental to arrest." There was no search warrant in existence at the time of the search and seizure (Tr. on Motion to Suppress Hearing, page 23).

The crux of petitioner's claim lies in the realm of consent. Contained within the record is the controversy or conflict of testimony offered by the State and by petitioner dealing with the question as to whether the petitioner did in fact consent (Tr. on Motion to Suppress Hearing). However, the central question is not whether the police testimony or the testimony of those present at the search is more creditable. Rather it is whether there is clear and positive evidence that the petitioner *freely and intelligently* gave his "unequivocal and specific consent" to the warrantless search "uncontaminated by any duress, actual or implied." *Channel* v. *U. S.*, 285 F.2d 217 (9th Cir. 1960). The Oregon Supreme Court itself recognized the basic premise that acquiesence is not enough for consent (Appendix A, page 13), but in the next breath held that there was consent (Appendix A, page 13) even in the light of its own conclusion that there was no evidence that petitioner expressly consented (Appendix A, page 13). Moreover, the record will substantiate that no

evidence of consent was presented by the State (Tr. on Motion to Suppress Hearing and specifically pages 17, 18, 63, 100-102 and 129 as to questioning by petitioner's counsel). If petitioner did not expressly consent as the Oregon Supreme Court itself found, it is inconceivable how he could be found to have still consented to the search and seizure.

Petitioner was fifteen years old at the time of the search and seizure. The Oregon Supreme Court indicted that they need not decide whether a mother could consent for her minor child (Appendix B, page 14), but petitioner submits the decision rests on no other factual basis. Surely a juvenile has the constitutional right of an adult and if consent is needed and to be found, it must come from the juvenile, himself and him alone, for if he is tried as an adult, he must be protected as an adult. *In Re Gault*, 387 U.S. 1 (1967), must point in this direction.

The burden of proving consent to a warrantless search is upon the State. *Wren* v. *U. S.*, 352 F.2d 617 (10th Cir. 1965); *Maxwell* v. *Stephans*, 348 F.2d 325 (8th Cir. 1965); *State* v. *Marshall*, 234 Or. 183, 380 P.2d 799 (1963). This burden was not met by clear and convincing proof. In deciding that consent was present, the Oregon Supreme Court continued the denial of petitioner's constitutional right to be free from a warrantless search, a search not incidental to a lawful arrest or a search lacking consent. Petitioner respectfully submits that he did not consent to a search of his person and that the Fourth Amendment standard of reasonableness has not been met.

II

Even assuming the State Supreme Court was correct in its decision that consent was present in this case, there exists within this decision the basic reason why this Court should hear this case. The reason being that consent was not given knowingly, based on the petitioner's understanding of certain rights of which he should have been, and of which he was not, apprised.

Escobedo v. *Illinois*, 378 U.S. 478 (1964) and *Miranda* v. *Arizona*, 384 U.S. 436 (1966) are both cases which require certain warnings to be given to subjects during criminal investigations, in order to protect Fifth and Sixth Amendment freedoms. These landmark decisions were prophylactic in their effect and were intended to discourage certain police practices which this Court found would endanger Fifth and Sixth Amendment rights. However, there is essentially no difference between a situation where interrogation is used to obtain a confession and a situation where a search is made and evidence seized which eventually points to a suspect's guilt. In both cases there is a danger that over-zealous police practices could infringe upon constitutionally guaranteed rights. It is the respectful contention of the petitioner that this Court should develop similar warnings with respect to Fourth Amendment freedoms.

In *Mapp* v. *Ohio*, 367 U.S. 643 (1961), this Court applied the federal rule dealing with the admissi-

bility of evidence gained from an unlawful search and seizure to state proceedings. The policy reason upon which the *Mapp* decision was based is the necessity of protecting individual rights, as guaranteed by the Fourth Amendment, from unreasonable police practices. This policy reason was discussed by the Court when it stated at pages 654, 655:

> "Today we once again examine *Wolf's* constitutional documentation of the right to privacy free from unreasonable State instrusion, and, after its dozen years on our books, are led by it to *close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right reserved to all persons as a specific guarantee against that very same unlawful conduct.* We hold that all evidence obtained by searches and seizures in violation of the Constitution is by that same authority inadmissible in a state court." (emphasis added)

The only way in which rights afforded under the Fourth Amendment may be properly protected from improper police practices is when a subject is able to knowingly refuse an improper search. By consenting to a search of his person, a defendant waives his right to refuse a warrantless search not incident to a lawful arrest. Waiver, under these facts, means the "intentional relinquishment of a known right or privilege." *Johnson* v. *Zerbst,* 304 U.S. 458 (1938). Moreover, one cannot waive something of which he is not aware. As stated in *U. S.* v. *Blalock,* 255 F. Supp. 268 (E.D. Penn. 1966):

> "Obviously the requirement of an intelligent

> consent implies that the subject of the search must have been aware of his rights, for an intelligent consent can only embrace the waiver of a known right. (citations omitted) Certainly, one cannot *intelligently* surrender that which he does not know he has. (citations omitted) The agents here properly warned defendant of his right to counsel and his right to remain silent, but they did not warn him of his right to refuse a warrantless search. The Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth. The requirement of knowledge in each serves the same purpose, i.e., to prevent the possibility that the ignorant may surrender their rights more readily than the shrewd."

These principles were espoused by the United States District Court of the District of Oregon in *Pogue* v. *Gladden* (Appendix C, page 31), where the Court stated:

> "I find that Pogue did not freely and voluntarily give his unequivocable and specific consent to the warrantless search of his motel room.
>
> "Officer Barbisan admitted that before Pogue's alleged consent, he was not advised of his right to the protection of a search warrant, the right to counsel, and the right to remain silent. Even if I believed the questionable testimony of Officer Barbisan about Pogue's consent, the search was unconstitutional because Pogue did not knowingly and intelligently waive his Fourth Amendment rights."

See also *Cipres* v. *United States*, 343 F.2d 295 (9th Cir. 1965); *Oliver* v. *Amiotte*, 382 F.2d 987 (9th Cir. 1967).

The problem of the ignorant being more likely to surrender their rights than the shrewd, as the Court discussed in the *Blalock* case, supra, becomes even more crucial in a case where the age of the defendant is considered. *Uveges* v. *Pennsylvania*, 335 U.S. 437 (1948). The petitioner was fifteen years of age when taken into custody. The time passing to his sixteenth birthday, he was remanded to adult court and tried as an adult. *Haley* v. *Ohio*, 332 U.S. 596 (1948), involved a criminal trial of a juvenile and the admissibility of a confession. Mr. Justice Douglas stated:

> "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law."

And from *In re Gault, supra,* comes this statement:

> "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."

The *Blalock* and *Pogue* decisions, supra, evidence a feeling prevalent in the lower federal courts that certain warnings are necessary to protect Fourth Amendment rights. The petitioner respectfully submits that this Court should give these principles universal application by means of a decision based upon the facts of this case. The facts of this case certainly present a sufficient basis for such a decision. Here a search was made which required the consent of the defendant (Tr. on Motion to Suppress Hearing, pages 2-31). This search was not preceded by the *Pogue* and *Blalock* warnings (Tr. on Motion to Suppress Hearing, pages 2-31). This search resulted in

evidence being seized and eventually being introduced into evidence which pointed to the petitioner's guilt (Tr. on Motion to Suppress Hearing, pages 6-8). A timely motion to suppress the evidence was filed (Motion to Suppress). The fact that this search was unprecedented by any warnings was adequately brought out at the trial level (Tr. on Motion to Suppress Hearing, pages 2-31).

The waiver of the right to refuse a warrantless search not incidental to a lawful arrest must be made knowingly and intelligently. *Johnson* v. *Zerbst*, supra. The petitioner respectfully submits that, absent the required warnings, no intelligent waiver can take place. The record shows that these warnings were not given. Thus it is the contention of the petitioner that this Court has adequate basis in fact and sufficient reason, both policy related and Constitutional, to develop the doctrine that intelligent waiver may only occur when a suspect has been adequately warned of his right to refuse a search without the protection of a search warrant, his right to counsel, and his right to remain silent.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

OTTO R. SKOPIL, JR.
Counsel for Petitioner

January 2, 1968.

APPENDIX A

UNITED STATES CONSTITUTION, AMENDMENT IV

"Security from unreasonable searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF OREGON
In Banc

State of Oregon,

Respondent,

v.

Dwain Lee Little, also known
as Dwain Lee Harden,

Appellant.

Appeal from Circuit Court, Lane County.
Roland K. Rodman, Judge.

Argued and submitted April 4, 1967.

Otto R. Skopil and Bruce W. Williams, Salem, argued the cause for appellant. On the briefs were Williams, Skopil & Miller and Harry C. Coolidge, Salem.

William F. Frye, District Attorney at Trial, Eugene, argued the cause for respondent. With him on the brief were Donald L. Pailette, District Attorney, and Francis Linklater, Deputy District Attorney, Eugene.

Before Perry, Chief Justice, and McAllister, Sloan, O'Connell, Goodwin, Denecke and Lusk, Justices.

DENECKE, J.

Affirmed.

DENECKE, J.

The defendant, who was 15 at the time of the

charged offense, was found guilty of first-degree murder.

I

Defendant contends that certain evidence was obtained by an illegal search and seizure. The evidence was blood, head and pubic hair, and saliva of the defendant. The defendant raised the issue by a timely motion to suppress.

The state seems to argue that the question is solely a fifth-amendment problem, the right against self-incrimination, and not a fourth-amendment issue, the right to be free from unreasonable search and seizure. It relies upon Schmerber v. California, 383 US 757, 86 S Ct 1826, 16 L ed 2d 908 (1956), for its position. We read Schmerber v. California as clearly requiring blood taking to be accomplished in conformity with fourth-amendment standards, as well as with fifth-amendment standards. Those standards were met in that case because the seizure, the blood taking, was incident to a lawful arrest.

We conclude that the fourth-amendment standards were met in this case because the seizure was made with the consent of the defendant.

The evidence about the seizure was sharply divergent. The trial court made detailed findings of fact and found that the defendant consented. There is ample evidence to support its findings. The court also stated the constitutional standards it deemed applicable in passing upon this issue. We are in agreement with those expressed standards, and the defendant does not contend they are incorrect.

The murder victim was a girl who lived in defendant's rural neighborhood. The defendant was not a prime suspect during the time here relevant. The defendant, along with others in the neighborhood, had been questioned by the state police and he had said that he saw a hunter, in the vicinity about the time of the murder. The defendant's family had retained an attorney after the initial questioning. The police asked the attorney if they might go to the defendant's house and take some clothing and personal effects for examination. After the attorney agreed and so informed the Little family, the police picked up this property. Apparently, after this, the defendant was away on a hunting trip and the police asked his mother to call when he returned. They explained that they wanted to show the defendant some photographs to see if he could identify the hunter he said he saw.

Later, the defendant's mother called the officer and told him her son had returned. The officer went to the house with the photographs. While there, the defendant's mother, in the defendant's presence, told the officer she had heard that various body samples were being taken from other boys in the neighborhood and asked if they were going to take some from her son. The officer said they would if it was agreeable. The mother responded that although she would like him to give the samples, because he had a cold she did not want him to go into town. Accordingly, it was arranged for a doctor to come out and the officer and a doctor came out that same day. The accused pulled his sleeve up and the physician took the blood. He also cut head and pubic hairs.

The officer later learned that the crime detection laboratory wanted saliva; therefore, the next day an officer went out with a vial. At the officer's request the defendant spat into the vial.

The trial court found that all this was conducted in a congenial atmosphere. There was no testimony, however, that the defendant expressly consented to any of the takings.

At some stage of the taking of the body substances defendant's attorney was called by defendant's mother in defendant's presence, and he approved the taking of the blood and hair, which he believed to be head hair. He was not asked about the pubic hair or saliva.

The state has the burden of establishing that the defendant consented to the seizure. State v. Marshall, 234 Or 183, 184, 380 P2d 799 (1963). Mere acquiescence to lawful authority is not consent. We do not need to decide whether a mother of a 15-year-old son can consent to a search and seizure of her son against his consent.[1] There was ample evidence to support the trial court's findings of fact that the son consented, in addition to his mother's consent. We also agree with the trial court's conclusion of law that the facts, as it found them, amounted to the requisite consent.

II

After the trial court had made its ruling denying the motion to suppress, the defendant filed a motion for a change of judge. The motion stated, among other things, that the judge was prejudiced and, therefore, disqualified under ORS 14.250.

The basis for the charge of prejudice was the trial court's written opinion on the motion to suppress. In effect the court stated that it did not believe the testimony of defendant's mother and father.

The defendant was not entitled to have his motion granted as a matter of course under ORS 14.250-14.270 because the court had already ruled on a matter in issue in the case, the motion to suppress, and the motion to disqualify, therefore, was not timely. Taylor v. Gladden, 232 Or 599, 602-603, 377 P2d 14 (1962). We do not need here to decide whether the statutory time limitations are applicable to motions to disqualify based upon specific charges of prejudice rather than "statutory prejudice" (as it was labeled in Taylor v. Gladden, supra (232 Or at 603) or "imputation of prejudice" (as it was labeled in State ex rel Lovell v. Weiss, — Or —, — P2d — (1967). The opinion of the trial judge, after hearing the testimony, that the testimony of witnesses favorable to the defendant was not worthy of belief is not evidence of prejudice.

"The unfavorable opinion of a party or witness which a hearing officer or a trial judge may entertain as a result of evidence received in a prior and connected hearing involving that individual is not 'bias' in the invidious sense. It is in effect a judicially-determined finding which may properly influence such officer or judge in a supplemental proceeding involving the penalty or punishment to be assessed, or the grace to be extended." Mackay v. McAlexander, 268 F2d 35, 39 (9th Cir 1959). Accord, Huntington v. Crowley, 64 Cal2d 647, 51 Cal Rptr 254, 414 P2d 382, 393 (1966).

III

Defendant moved for an order requiring the state to produce for defendant's inspection and copying or photographing the following:

(1) Personal property taken from the defendant or defendant's parents;

(2) Bodily substances taken from the defendant;

(3) Personal property taken from third persons;

(4) Bodily substances taken from third persons;

(5) (a) Notes of conversations with defendant or written statements taken from defendant;

(b) The same as (a) in regard to third persons and made in the investigation;

(c)-(f) Reports regarding tests made of items in (1), (2), (3), (4).

The court allowed item (1), inspection and photographing of personal property of defendant, and a portion of item (5), the inspection and copying of any written or recorded statements taken from defendant. The court also granted defendant the right to inspect and copy any autopsy reports made upon the victim's body. The remainder of the motion was denied and defendant assigns such denial as error.

Oregon has statutes concerning discovery in both criminal and civil proceedings. ORS 41.615 provides:

"(1) Upon motion of any party showing good cause therefor, and upon notice to all

other parties, and subject to the provisions of ORS 45.181, the court in which a proceeding is pending may:

"(a) Order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by ORS 45.151 and which are in his possession, custody or control; or

"* * * * *"

ORS 136.510 provides:

"The law of evidence in civil actions is also the law of evidence in criminal actions and proceedings, except as otherwise specially provided in the statutes relating to crimes and criminal procedure."

In State v. Leland, 190 Or 598, 615, 227 P2d 785, affm'd 343 US 720, 72 S Ct 1002, 96 L ed 1302, rehr den 344 US 848, 73 S Ct 4, 97 L ed 659 (1951), we held that the predecessor statute of ORS 41.615, quoted above, was a part of the law of evidence and, unless otherwise specially provided, is by reason of ORS 135.510, also above quoted, applicable to criminal actions.

In 1961 the legislature enacted ORS 133.755, entitled "relating to discovery and inspection in criminal actions":

"(1) Upon motion of a defendant, at any time after the filing of the indictment or information, and upon a showing that the

items sought are material to the preparation of his defense and that the request is reasonable, the court may order the district attorney to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant, including written statements or confessions made by the defendant. The order shall specify the time, place and manner of making the inspection and of taking copies of photographs and may prescribe such terms and conditions as are just.

"(2) Inspection of the items described in subsection (1) of this section may be made in criminal actions in accordance with the provisions of subsection (1) of this same section and no other."

The defendant contends that ORS 41.165, as well as ORS 133.755, is applicable. The state contends that in ORS 133.755, the criminal discovery statute, it is "specially provided" that that statute alone shall govern criminal proceedings.

Subsection (2) of ORS 133.755 provides: "Inspection of the items described in subsection (1) of this section may be made in criminal actions in accordance with the provisions of subsection (1) of this section and no other."

This subsection is not clear. It might be contended that the phrase, "and no other," refers to the manner in which inspection may be obtained. However, such a meaning would be far more evident if the statute stated "and *in* no other" or, "and in no other manner."

We conclude that ORS 41.615 does not apply to criminal cases and this aspect of discovery in criminal cases is covered by ORS 133.755.[2]

This conclusion is in accordance with the legislative history of ORS 133.755. The minutes of the Senate Judiciary Committee considering HB 1156 which became ORS 133.755 contain the following statement:

> "This bill was introduced because of action taken by the 1959 legislature whereby they repealed ORS 41.630 providing for a broad and comprehensive discovery and inspection procedure in civil proceedings. The Supreme Court in State v. Leland held it also applied to criminal proceedings. The 1959 legislature substituted numerous other sections which by their nature could not apply to criminal proceedings, so the interim committee felt that there was no longer any section in the Code that allowed the defendant discovery and inspection proceedings in criminal actions."

See, also, Report of the Legislative Interim Committee on Criminal Law, Jan 1961, p 21; Ellis, *Discovery in Oregon Criminal Cases*, 4 Willamette L J 167, 177-181 (1966).

It is also in accord with our decision in State v. Foster, 242 Or 101, 105, 407 P2d 901 (1965), relied upon by defendant as indicating this court's more liberal view toward discovery in criminal cases. In that case we held that at the close of the state's direct examination of a state's witness, the defendant was entitled to examine a pretrial statement given by that witness to the

state. This enables the defense to use such statement for possible impeachment of the witness upon cross-examination. However, in that same case we held that the trial court was correct in denying the defendant's pretrial motion to examine the statements of several witnesses. We recognized that such a ruling was a restraint upon pretrial discovery, but, nevertheless, approved such restraint.

Having determined that the defendant's right to inspect is governed by ORS 133.755, his motion to inspect shall be measured by that statute.

That section authorized the inspection of "tangible objects, obtained from or belonging to the defendant." The bodily substances, blood, hair and saliva, are such "tangible objects." However, the statute also requires a showing that "the items sought are material to the preparation of his [defendant's] defense." Counsel, in his affidavit in support of the motion to inspect, states that it is necessary that the items enumerated in the motion be produced so counsel may properly conduct the defense by having tests performed upon such items.

These same bodily substances, blood, hair and saliva, could have been obtained from the defendant by his counsel at the time the motion was made. Our lay belief is that such substances would have had the same characteristics at the time of the motion as at the time the substances were taken from defendant by the police during the investigation. We may be in error in this belief; however, the defendant has the burden of overcoming this belief by making a showing that

there may be different characteristics in the substances taken just before trial from those taken by the police at the time of investigation. No such showing has been made. Nor did the defendant claim that the items had been altered after being taken from the defendant and before they were tested or that an examination of the items taken by the police was necessary to assess the validity of the tests made by the police. We hold that the bodily substances sought were not material to the defense.

The statute does not authorize the pretrial inspection of personal property, bodily substances, or prior written statements taken from third persons. The Oregon statute, ORS 133.755, was patterned after the Federal Rules of Criminal Procedure, Rule 16, 18 USCA, with the significant difference that the Federal Rules expressly authorize inspection of "tangible objects * * * obtained from others" as well as from the defendant, while the Oregon statute does not contain those quoted words, but only states objects "obtained from or belonging to the defendant."

The defendant stresses that he was handicapped in his defense by his inability to obtain a pretrial inspection of the laboratory tests made by the police. Testimony of the results of these tests of defendant's blood, hair and saliva was damaging to defendant.

The federal courts operating under Rule 16 have consistently held that such reports are not subject to pretrial inspection.

"So far as the laboratory report is con-

cerned, it does not differ from the statement of any other non-party witness. It is not covered by Rule 16, F. R. Crim. P., 18 USC because not 'obtained from or belonging to the defendant or obtained from others by seizure or by process.' * * *" United States v. Tirado, 25 FRD 270, 271 (SD NY 1958). Accord, United States v. Telles, 226 F Supp 670 (ND Cal 1964).

Rule 16 was enlarged in 1966 and now provides as follows:

"* * * (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government * * *." Federal Rules of Criminal Procedure, Rule 16, 18 USCA (as amended Oct. 16, 1966).

Oregon has not so amended its discovery statute.

The trial court ordered the state to produce for defense counsel's inspection all clothing taken from defendant or given by him or his parents to the police; nevertheless, a pair of blue jeans which the police had taken were not turned over to counsel. The record convinces us that this omission was through inadvertance.

Regardless of the motive of the police, the omission did not prejudice defendant. When the omission was called to the trial court's attention during the trial, the court offered to continue the trial while defendant had the jeans examined by an expert. The defense did not accept the of-

fer. Thereupon the report of the laboratory about these jeans was given to the defense. This report was from the same laboratory that would have made the examination for the defense if it had been given the jeans for pretrial inspection. The report given the defense is more comprehensive than it would have received if it had been given the jeans and sent them for tests because the blood spots had been removed from those jeans by the time they should have been made available for pretrial inspection, whereas the document given the defendant contained a report concerning those blood spots.

We conclude the defense was not prejudiced by the omission.

The trial court's action upon defendant's motion for pretrial inspection was correct.

IV

The defendant moved for a judgment of acquittal after the state had rested and assigns the trial court's denial of his motion as error.

The indictment charged a felony murder; it alleged that the defendant, while committing rape or attempting to commit rape on the victim, killed her by stabbing her with a knife.

The case was substantially all proved by circumstantial evidence; however, that is not ground for reversal.

The defense argues that although this was a felony murder charge, which requires proof of one of several specified collateral felonies, including rape or attempted rape, the state presented

only proof of an assault which brought about the death and, therefore, was not collateral and presented no proof of rape or attempted rape. ORS 163.010. The collateral felony required to prove felony murder takes the place of the premeditation otherwise required in first-degree murder.

There was proof of intercourse with the victim; however, the expert opinion was that this act took place after the victim was dead. This raises a question whether the act constituted rape. However, the sequence of assault followed by the act of intercourse is evidence of an intent to commit rape and an attempt to commit rape. Therefore, there was evidence of the commission of the collateral felony.

Commonwealth v. Gricus, 317 Mass 403, 58 NE2d 241 (1944), concerned a felony (rape) murder charge. The court stated: "Upon the evidence the jury properly could find that the defendant killed Mrs. Parent either in reducing her to helplessness prior to forcible sexual intercourse against her will, or in stilling her outcries during such intercourse. In either event, the murder would be murder in the first degree." 317 Mass at 412.

V.

The defendant moved for a change of venue, contending that there had been such wide publicity in Lane county, where the charge was brought, that he could not get a fair and impartial trial in such county.

ORS 131.420 provides for a change of venue

"[w]hen it is made to appear to the satisfaction of the court that a fair and impartial trial cannot be had in the county where the action is commenced."

Supporting the motion were affidavits of prominent members of the Lane county bar to the effect that the defendant could not get a fair trial in Lane county, numerous newspaper clippings and a statement, signed by numerous persons, to the effect that the defendant could not get a fair trial in Lane county.

The defendant in his statement attached to the motion stated that the news media accounts were "factual"; however, the wide coverage "inevitably makes the crime an affront to the conscience of the community."

One of the two newspaper stories cited in the brief as exemplary of the news coverage which was the basis of the motion for new trial was as follows:

> "The girl's throat had been slashed twice, she was struck several times on the head with a blunt instrument, and she had been sexually assaulted in the most brutal crime in this area since 1960."

None of the news coverage is alleged to have stated or intimated that the defendant committed the crime. The prejudice, if any, would have been created against whomever was tried for the crime. In the *Sheppard* case, Sheppard v. Maxwell, 384 US 333, 86 S Ct 1507, 16 L ed 2d 600 (1966), the court found that the news coverage prejudiced defendant so as to deprive him of a

fair trial by, among other things, making it appear as if the defendant had committed the crime.

The decision on a motion for change of venue is largely within the discretion of the trial court. Although its discretion is not unlimited, the nature of the news coverage in this case does not impel us to conclude that the defendant could not receive a fair and impartial trial in Lane county; therefore, we affirm the order of the trial court.

VI

The last assignment of error is directed at the trial court's failure to instruct in a manner for which the defendant now contends.

The state offered three guns in evidence, Exhibits 5, 6 and 7; 5 and 6 were received and 7 was not. At the end of the presentation of the evidence it was the opinion of the trial court that 5 and 6 had no relevancy without 7. The state did not claim that 5 and 6 had anything to do with the commission of the crime; however, it contended that the condition of guns 5 and 6, as contrasted with 7, indicated that 7 might have a connection with the crime.

The trial court ordered 5 and 6 withdrawn and stricken from the evidence. The court instructed the jury, generally: "Testimony or exhibits which may have been received but ordered stricken by the court, you are to disregard entirely."

The defense contends that the court should have instructed the jury to specifically disregard

Exhibits 5 and 6, the two guns. No such instruction was requested. No exception was taken to the general instruction given. Even if defendant had preserved his claim of error, we consider the trial court's action in not singling out these two particular exhibits for comment as well within its discretionary power of casting the form of instructions.

Affirmed.

FOOTNOTES

[1] *Third Party Consent to Search and Seizure*, Wash U L Q, 12, 27-28 (1967); Reeves v. Warden, Maryland Penitentiary, 346 F 915 (4th Cir 1965).

[2] The right to the autopsy report is not a discovery right but is granted by ORS 146.560 and 432.130.

We need not decide in this case the question of whether the statutes are exclusive and no type of discovery is permitted unless expressly authorized by statute. ORS 133.755 refers to the type of discovery sought here and, therefore, is controlling in this case.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

RAY POGUE, #30844, Petitioner,	)	Civil No.
vs.	)	66-530
CLARENCE T. GLADDEN, Warden, Oregon State Penitenitary, Respondent.	)	OPINION August 2, 1967

James H. Jordan,
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SOLOMON, Judge:

Ray Pogue, a prisoner in the Oregon State Penitentiary, filed a petition for a writ of habeas corpus to set aside his judgment of conviction and 10-year sentence for burglary in a dwelling house.

Petitioner contends that his conviction must be set aside because cylinder cases containing 50c pieces obtained through an unlawful search and

seizure were admitted in evidence in violation of his Fourth Amendment rights.

At the trial petitioner moved to suppress this evidence. The Court held a hearing outside the presence of the jury. Gino Barbisan, a Eugene police officer, testified about the events leading up to the seizure of the coins.

The parties stipulated that I could decide this case upon the agreed facts in the pretrial order and the transcript of the proceedings in the State Court on a motion to suppress, as supplemented by petitioner's testimony in this case.

Officer Barbisan saw Pogue's car parked in front of the Golden Canary Tavern in Eugene. He watched the car because he had received a teletype that the Portland police suspected that the car was used in the burglary of a Portland home. When Pogue and his girl friend drove away, Barbisan followed them until he stopped Pogue for driving 35 miles an hour in a 20-mile zone. Barbisan discovered that Pogue had an out-of-state driver's license, and he asked Pogue to follow him to city hall to post bond. At the city hall Pogue consented to the search of his car, but nothing was found. Barbisan and Sergeant Loniger then took Pogue to the sheriff's office. Pogue told the police that he was on probation from an Idaho check charge. The police called Pogue's Idaho probation officer and learned that Idaho had a probation violation hold for Pogue. Officer Barbisan then arrested Pogue and asked him to empty his pockets and place the contents on the table.

Barbisan testified that Pogue placed the key

to his motel room and other small items on the table. Barbisan stated that when he asked Pogue if he wanted the police to go to his motel room and pick up his belongings, Pogue said he would appreciate it.

Pogue was kept at the police station while Barbisan, without a warrant, went to Pogue's room. Barbisan found a handkerchief on an end table containing cylinder cases filled with coins.

Barbisan admitted that prior to searching the room he did not tell Pogue that he suspected Pogue of burglary or that Pogue had the right to a lawyer, the right to remain silent, and the right to the protection of a search warrant.

After Barbisan found the coins, he returned to the police station. He then advised Pogue of his constitutional rights. When he confronted Pogue with the coins and asked Pogue if he wanted to talk about them, Pogue refused.

Pogue denied Barbisan's version of the search. Pogue stated that he neglected to take the key out of his pocket and that the police found it when they "shook him down." Pogue asserted that one of the officers took the key without his permission and without saying anything and that the officer returned shortly thereafter with the coins.

At the trial, the State offered in evidence the cylinder cases of coins. Pogue objected on the ground that this evidence was the product of an illegal search and seizure. The trial judge was of the opinion that the admissibility depended on whose testimony he believed. The

Judge believed the police. He therefore held that the search was legal because Pogue consented to it.

The Oregon Supreme Court affirmed the trial court's finding that Pogue consented to the search. *State* v. *Pogue*, 243 Or. 163 (1966).

In this proceeding Pogue contends that the search was illegal because he did not tell the police that they could go to his room. Pogue also contends that even if he told the police that they could go to his room, the search violated his Fourth Amendment rights because, prior to the alleged consent, he was not advised of his right to the protection of a search warrant, his right to remain silent, or his right to counsel.

In *State of Montana* v. *Tomich*, 9 Cir. 1964, 332 F.2d 987, 990, the Ninth Circuit Court of Appeals stated:

> "A state court finding of consent does not bar an independent determination of that question in federal court in a federal habeas corpus proceeding. A waiver affecting federal rights is a federal question."

I find that the cylinder cases and coins were seized as a result of an unconstitutional search, and petitioner's judgment of conviction and sentence must therefore be set aside. I have difficulty in believing that Pogue told the police that he would "appreciate" their picking up his things when he knew that the police would find the incriminating evidence in his room and when after the coins were seized and he was advised of his rights, he refused to talk about the coins.

I am reinforced in my opinion by the fact that Pogue allegedly gave his verbal consent after he had been stopped for speeding, arrested for a probation violation, searched in the Sheriff's office by two police officers, and after he knew that the incriminating evidence could easily be found in his motel room.

The central question is not whether the police or Pogue's testimony is the more creditable. It is whether there is clear and positive evidence that the petitioner freely and intelligently gave his "unequivocal and specific consent" to the warrantless search "uncontaminated by any duress actual or implied." *Channel* v. *United States*, 9 Cir. 1960, 285 F.2d 217, 219.

In *Channel* the defendant was arrested and taken to the Federal Bureau of Narcotics. He told the police, "I have no stuff in my apartment and you are welcome to go search the whole place." The trial court denied Channel's motion to suppress the heroin because it found that he consented to the search. The Ninth Circuit Court of Appeals reversed because Channel did not "freely and intelligently give his unequivocable and specific consent to the search without a warrant." The Court quoted with approval the following statement from *Judd* v. *United States*, D.C. Cir. 1951, 190 F.2d 649, 651, a case in which the defendant while in jail told the police that he had nothing to hide and that they could go there and see for themselves:

> ". . . Conceivably, that is the calm statement of an innocent man; conceivably, again, it is but the false bravado of the small-time

criminal. But, however it be characterized, it hardly establishes willing agreement that the officers search the household without first procuring a warrant. Comparable statements have been held insufficient where the victim of the search was safely in his home, his place of business, or in his automobile. Surely they acquire no more force when procured under the circumstances here present." 190 F.2d 651-652.

In *Cipres* v. *United States*, 9 Cir. 1965, 343 F.2d 95, the Ninth Circuit Court of Appeals again held that a search without a warrant was not necessarily legal and constitutional merely because the defendant verbally agreed to it. The Court stated:

"The district court treated the issue as simply whether or not Cipres told the officers they might search the suitcase. Seeing 'no reason why I should disbelieve the testimony of the two officers,' the court admitted the evidence.

"But the issue the court was required to decide was much broader, and could not be resolved simply by weighing the credibility of Cipres against the of the officers. The issue was whether Cipres had waived her constitutional immunity from unreasonable search and seizure. Waiver, in this context, means the 'intentional relinquishment of a known right or privilege.' *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938). Such a waiver cannot be conclusively presumed from a verbal

expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld. We recently sustained a district court finding that such waiver was lacking despite an express verbal consent, and such cases are common. They rest not only upon the nature of waiver itself, but also upon a recognition that the purpose of the exclusionary rule is not only to discourage overreaching by police officers, but also, and primarily, to protect the rights of the citizen. The crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officers to suppose that he did." 343 F.2d 97-98.

In *United States* v. *Nikrash*, 7 Cir. 1966, 367 F.2d 740, and *United States* v. *Blalock*, E.D. Pa. 1966, 255 F. Supp. 268, the Courts held that a defendant could not knowingly and intelligently waive his Fourth Amendment Rights if the police had not informed him of these rights. In *Blalock* the Court stated:

". . . Obviously, the requirement of an 'intelligent' consent implies that the subject of the search must have been aware of his rights, for an intelligent consent can only embrace the waiver of a 'known right.' [citations omitted] Certainly, one cannot *intelligently* surrender that which he does not know he has. [citations omitted] The agents here properly warned defendant of his right

> to counsel and his right to remain silent, but they did not warn him of his right to refuse a warrantless search. The Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth. The requirement of knowledge in each serves the same purpose, i.e., to prevent the possibility that the ignorant may surrender their rights more readily than the shrewd." 255 F. Supp. at 269.

I find that Pogue did not freely and voluntarily give his unequivocable and specific consent to the warrantless search of his motel room.

Officer Barbisan admitted that before Pogue's alleged consent, he was not advised of his right to the protection of a search warrant, the right to counsel and the right to remain silent. Even if I believed the questionable testimony of Officer Barbisan about Pogue's consent, the search was unconstitutional because Pogue did not knowingly and intelligently waive his Fourth Amendment Rights.

The Police could have advised Pogue of his right to insist upon a search warrant. If he refused to grant them permission to search his room without a warrant, they had ample time within which to obtain a warrant. This could have been done without impeding their investigation and without much inconvenience, because they had already arrested Pogue and he was in their custody.

Petitioner's application for a writ of habeas corpus is granted, and the State of Oregon is ordered to release him from custody within 20 days unless prior to that date the State of Oregon

grants petitioner a new trial or unless the defendant Gladden obtains a stay pending appeal from the United States Court of Appeals.

This opinion shall serve as findings of fact and conclusions of law pursuant to Rule 52(a) Fed. R. Civ. P.

Dated this 2nd day of August, 1967.

GUS J. SOLOMON
United States District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1967

NO. 1020

DWAIN LEE LITTLE, also known as Dwain Lee Hardin,

Petitioner,

v.

STATE OF OREGON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

JOHN B. LEAHY, District Attorney
for Lane County, Oregon
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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

STATEMENT OF THE CASE

On November 2, 1964, Orla Fay Fipps was brutally raped and slain. During the following routine investigation, law enforcement officials took samples of bodily substances from area residents, including the petitioner. These items became the subject of a pre-trial motion to suppress. The trial court ruled that the evidence was taken with the consent of the petitioner. The petitioner was convicted of murder in the first degree. The Oregon Supreme Court affirmed the judgment.

ARGUMENT

This Court should not grant a writ of certiorari for review of the decision of the Oregon Supreme Court (reported at 88 OAS 205, 431 P2d 810 (1967) and contained in Petition for Writ of Certiorari to Supreme Court of Oregon marked Appendix B) for the following reasons:

I

The first Question Presented by petitioner is a question of evidence and not a federal constitutional question. The petitioner asks this Court to determine whether there was sufficient evidence of consent in the record for the court to properly determine that Fourth Amendment standards were met. The trial court so found and the Oregon Supreme Court found that there was "ample evidence to support its findings". The petitioner was not a prime suspect at the time of the seizure, the petitioner's mother consented, the petitioner pulled up his sleeve and a doctor withdrew the blood sample and cut the head and pubic hair sample. Later a saliva sample was taken. All this was done in a "congenial atmosphere". The petitioner's attorney approved of the taking of the blood and saliva. All this is an evidentiary question for the state court and should not be reviewed by this Court.

In *Stoner v. California*, 376 US 483, 84 S Ct 889 (1964), this Court recognizes that consent may be proferred by act as well as speech:

> "It was a right [constitutional right against unreasonable search], therefore, which only the peti-

> tioner could waive by word *or deed*, either directly or through an agent." (Emphasis added).

This case is peculiarly exemplary of the comment of Mr. Justice Harlan in his dissent in *Fahy v. State of Connecticut*, 375 US 95, 84 S Ct 229 (1963);

> "Evidentiary questions of this sort are not a proper part of this Court's business, particularly in cases coming here from state courts over which this Court possesses no supervisory power."

Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances. *People v. Burke*, 47 Cal 2d 45, 301 P2d 241 (1956).

II

The second Question Presented asks the Court to make new law by requiring warnings similar to *Miranda* warnings (*Miranda v. Arizona*, 384 US 436 (1966)) as a prerequisite to a valid consent to search of person.

This matter should not be considered by this Court in this case for the reason that the search in question occurred prior to the date of the *Miranda* opinion. In *Johnson v. New Jersey*, 384 US 719, 86 S Ct 1772, 16 Cal 2d 882 (1966), this Court has held that retroactivity should not be afforded the *Miranda* rule.

Also, the petitioner was not a focal suspect and not in police custody at the time of the search and in fact consulted with his attorney prior to his consent.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari to Supreme Court of Oregon on file herein.

Respectfully submitted,

JOHN B. LEAHY, District Attorney
for Lane County, Oregon

February 7, 1968